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April 6, 2004

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, S.W
Washington, D.C. 20554

Dear Ms. Dortch

Enclosed are an original and five copies of the Petition of Newton Minow and Henry Geller for Expedited Rulemaking to Require Public Service Time for Political Broadcasts of Significant Local Candidates Otherwise Not Covered. Enclosed also is a Disk containing the petition (in Word format). If you have any question concerning this filing, please contact me at the above or my email address, gellerhenry@aol.com.

Thank you for processing this.

Sincerely yours,

Henry Geller

Original

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

PETITION OF NEWTON MINOW AND HENRY GELLER FOR EXPEDITED RULEMAKING TO REQUIRE PUBLIC SERVICE TIME FOR POLITICAL BROADCASTS OF SIGNIFICANT LOCAL CANDIDATES OTHERWISE NOT COVERED

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1. Introduction and Summary. This petition is filed by Newton Minow, former FCC Chairman, and Henry Geller, former FCC General Counsel and NTIA head. It requests that the Commission commence an expedited rulemaking proceeding to adopt a policy requiring broadcast licensees, during a short specified period (30 days) before a general election, to devote a reasonable amount of public service time (20 minutes) during the broadcast day to appearances of candidates in significant local races which otherwise would not receive coverage informing the electorate The allocation scheme for broadcasting strongly militates for such a requirement, especially in view of recent research showing failed broadcast efforts to inform the public on such local campaign issues. The details of the proposal, the grounds therefor, and its validity, are discussed below.

2 The broadcast licensee, as a public trustee, has a special obligation to present political broadcasts, including serving as an effective local outlet in this respect. Broadcasters are public trustees, " given the privilege of using scarce radio frequencies as proxies for the entire community. ." (Red Lion Broadcasting Co. v. FCC, 395 U.S 367 (1969) [1] Two laws, the 1992 Cable Act[2] and the 1990 Children's Television Act,[3] establish Congress' continuing recognition and stress of this concept " .America's system of broadcasting . is a unique system that emphasizes responsiveness to the local community and places the broadcaster in the role of public trustee for the frequencies it is permitted to use "[4] It is thus a system of local outlets, with a very large allocation of spectrum space to broadcasting so as to facilitate this

[1] See also Turner Broadcasting Sys., Inc. v. FCC, 114 S.Ct 2445, 2456-57 (1994); CBS, Inc. v. FCC, 453 U.S. 367, 395. Red Lion established the constitutionality of the fairness doctrine and that the FCC does not exceed its authority "in interesting itself in ... the kinds of programs broadcast by licensees (id. at 395).
[22] 1992 Cable Television Consumer Protection and Competition Act, Pub. L. 102-385. 106 Stat. 1460.
[3] Children's Television Act of 1990, Pub L 101-437, 101st Cong., lst Sess., 47 US.C. Secs. 303a-b
[4] S. Rep. No. 92, 102d Cong., 1st Sess. 42 (1991).

localism quality. The broadcasters themselves have vigorously opposed spectrum usage fees specifically on the ground that they have a public service obligation and therefore cannot act like the usual business simply to maximize profits.[5]

The licensee necessarily has great discretion in fulfilling that public trustee role But the Act makes clear that there are two public service areas upon which the broadcaster must focus: educational and informational programs for children (see n.3) and political broadcasts. As the Supreme Court stated in Farmers Educational and Cooperative Union v. WDAY, 360 U.S. 525, 534-5 (1959), that is the essential message of Section 315 of the Act:

> the thrust of section 315 is to facilitate political debate over radio and television. Recognizing this, the Communications Commission considers the carrying of political broadcasts a public service criterion to be considered ... in license renewal proceedings.. [6]

The legislative history of Section 312(a)(7) affirms this licensee duty to present political broadcasts In 1971, in connection with campaign reform legislation, Congress added the "lowest unit rate" requirement of Section 315(b), and, fearful that broadcasts would then avoid political broadcasts, especially campaign commercials, it also inserted the requirement of Section 312(a)(7) that broadcasters afford reasonable access for candidates for

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[5] See, e.g., Broadcasting & Cable Magazine, June 13, 1994, 42-43; April 19, 1993, 64.

[6] The Commission and its predecessor agency, the Federal Radio Commission (FRC), from the earliest days, have taken into account whether a licensee has met its responsibilities in the field of political broadcasts. See Memorandum of the FCC Concerning Interpretation of Second Sentence of Section 315(a), FCC 63-412, at 10. Thus, in the 1919 Great Lakes case, the FRC stated: "In a sense, a broadcasting station may be regarded as a sort of mouthpiece on the air for the community over which ..its political campaigns ... may be broadcast" (FRC 3rd Annual Report, at 32-36). See also Report and Statement of Policy Re: Commision En Banc Programming Inquiry, 20 P & F., R.R. 180 (1960)

Federal office. The Senate Report (No. 92-96, 92d Cong., 1st Sess., 28 (1971) states:

> The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, and the FCC should continue to consider the extent to which each licensee has satisfied his obligation in this regard in connection with the renewal of his broadcast license Certainly no diminution in the extent of such programming should result from enactment of this legislation (Emphasis added).[7]

There is a further background point before turning to the thrust of our petition While the term "political broadcasts" largely connotes presentation by the candidate (most often in short commercials), there is another important facet -- the licensee's coverage of a campaign as part of broadcast journalism. Congress has soundly sought to promote this important contribution to an informed electorate by exempting such journalistic efforts as bona fide newscasts, news interview programs, documentaries, and on the spot coverage of news events, from the equal time requirement of Section 315(a). See 47 U.S.C. 315(a)(1)-(4).

As shown above, broadcasters cannot restrict their efforts to inform the electorate to their own journalistic activities. There must also be the uncensored use of the station's facilities by the candidates themselves -- in

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[7] See also the Senate Report, supra, at 34: "The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interest of the community of licensees." As a "conforming amendment" needed in light of the new Section 312(a)(7), the legislation added the underlined phrase to the second sentence of Section 315(a) "No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate." See S. Conf. Rep. No. 92-580, 92d Cong., 1st Sess. 22. The purpose of this sentence is to make clear the broadcaster is not a common carrier (see Section 3(h)) and that it can exercise discretion in selecting the races to be covered (but now with provision specified in 312(a)(7) for Federal candidates). As shown in the discussion within, we agree with this point concerning the broadcaster's wide discretion

their own language or presentations rather than through the editorial filter or selectivity of the broadcast journalist In short, there must be, to some reasonable extent, the candidate's use of broadcasting as an electronic speaking platform or soapbox.

3. Broadcasters should devote a reasonable amount of public service programming time for candidates to use in local races warranting but not receiving such coverage. Of crucial importance to this petition, the broadcaster must act as a reasonably effective outlet for informing the electorate in local races that are important to the community or communities in their main coverage area but otherwise would not receive any reasonable coverage. Broadcasting has been given so much spectrum precisely to contribute to an informed local electorate If the objective were to inform the electorate only on national or state-wide races, an entirely different allocation plan would suffice -- fewer but more powerful stations covering the state. Under the plan adopted, the broadcaster is a local public trustee to render public service to its community or communities.

This means that the broadcaster cannot sit back and simply rake in the millions upon millions spent by the major party presidential, senatorial or gubernatorial candidates for commercials. This huge and growing expenditure does inform the public about candidates in which they have a great interest, but it is not the public service for which the free use of so much spectrum is based. Some broadcasters do render public service in their journalistic efforts as to these national or state-wide races, a matter

discussed at length within. The races that uniquely and strong compel a special public service effort are those that are of obvious importance to the community (in the judgment of the broadcaster) but have no expenditure for commercials and little if any journalistic coverage. They can be for the House in many cases, city or county council or commissioner, mayor, school board, or many other local offices that can be of great significance to the community in the circumstances. In exchange for free use of the valuable and generously allocated spectrum, a public trustee, putting profits second and public service first, can and should be required to make a reasonable contribution to an informed local electorate in this important respect.

However, broadcasters are not making that contribution, and as a result, many important local races receive no broadcast coverage. This is shown by the research efforts of the Lear Center Local News Archive, conducted by USC Annenberg School and the University of Wisconsin NewsLab. The research analyzed the highest-rated half-hour news programs aired in early and late evening every night of the week in the period September 18 through November 4, 2002 on 122 randomly selected local television stations in the top 50 media markets. The release issued on the report[8] (herein called the Lear report) contained the following findings:

Majority of local news contained no election coverage

[8] A full copy of the report is at www localnewsarchive.org/pdf/LocalTV2002.pdf.

> Over the seven-week period analyzed, 56 percent of the top-rated half-hour news broadcast did not contain a single campaign story. In the 44 percent that did, the average election story was 89 seconds long When campaign stories aired, only 28 percent contained candidates saying anything at all. In those stories showing candidate speaking, the average sound bite was 12 seconds long...
>
> **Few stories focus on campaign issues or local races**
>
> Overall, 48 percent of the stories in the sample were about either campaign strategy or the campaign horserace...Only 27 percent of the stories that aired focused on campaign issues or analyzed political advertising.
>
> Nationwide, 38 percent of all campaign stories focused on a gubernatorial race. In contrast, 20 percent of the stories focused on U.S. Senate races, and only seven percent centered on the U.S House.
>
> Races for the state legislature only accounted for three percent of the stories, and potentially high-profile statewide races, such as secretary of state or attorney general, were the focus of just two percent of the stories. Four percent of all the stories focused on regional, county or city offices, and six percent were stories about ballot initiatives or referenda. The remaining stories focused on voting issues (11 percent), multiple races (six percent), the courts (one percent), and other aspects of the election process (one percent)
>
> Even when counting stories about U.S House races as a type of local election, only 14 percent of all stories in the same focused on local races ..

These figures clearly indicate that broadcast journalism is not contributing adequately to informing the public on local races. In the case of Presidential, Senatorial and gubernatorial, campaign ads can and do make such a contribution. But in all other cases of local races (e.g., House, state legislature, state offices, county or city offices, etc.), as the Commission well

knows, candidates generally do not have the financial base to buy time for ads.[9] The bottom line is that there can be and almost always are important local races that are not covered by broadcasters, either through journalism or campaign ads. Broadcasters, public trustees under an obligation to serve their local communities, are marked failures in this vital aspect.

4. The proposal to remedy the above public service deficiency is reasonable, affords great discretion to the licensee, and is not burdensome or disruptive

The most effective way to remedy the above deficiency is through affording public service time to the local candidates to present their views in the local races chosen by the broadcaster because of their importance to the community. To seek a remedy through affecting broadcast journalistic efforts would interfere with the licensee's judgment of who and what should be presented in newscasts, news interviews, or news documentaries, and in any event would not be as effective as the public service programming time.

We urge that as in the case of the other core responsibility, children's educational programming, there should be quantitative guidelines -- a "safe harbor" -- as to the amount of public service programming time for the candidates involved and the general times for broadcast. The Commission clearly has authority to so proceed. See McConnell v Federal Election Commission, 124 S.Ct. 619, 714-716 (". .the FCC's regulatory authority is broad Red Lion, supra, at 380 ("broad" mandate to assure broadcasters

[9] See Kenneth Goldstein and Joel Rivlin, Political Advertising in the 2002 Election, Chapter two, available online http //www.polisci.wisc.edu/tvadvertising/Political%20Advising%20om %29th&202002%Elections.htm, showing the great amounts spent for gubernatorial and senatorial races and substantial but smaller amounts for

operate in the public interest) . ."); FCC must determine ". . whether a broadcasting station is fulfilling its licensing obligation to broadcast material important to the community and the public", FCC must determine "...whether broadcasters are too heavily favoring entertainment and discriminating against broadcasts devoted to public affairs...") [10]

We urge this approach of a guideline or "safe harbor" for two reasons. First, as shown by past experience (e g., the initial implementation of the Children's Television Act), without such quantitative guidelines, the policy is simply too "mushy" and runs the clear danger of being ineffective. Second, in this sensitive First Amendment area, we urge that it is wrong not to let the licensee and the public know what the ground rules are. The renewal applicant is going to assessed on this score; to hold that its renewal must be denied or truncated because of inadequate performance in this respect, without any prior proper guidance, undermines the First Amendment.[11]

The approach should be one that constitutes a significant contribution -- yet does not unfairly burden the broadcaster, is not unduly disruptive of its schedule, and leaves the licensee with the greatest possible discretion as to the

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the House seats (the 40 or so hotly contested House races). Cf. James T. Hamilton, All the News That is Fit to Sell, Princeton U. Press 2004, Chap. 5.

[10] See Sections 303(b), 303(r), 4(i), 307, 309. 315(a) and 312(a)(7) (the latter section is discussed within). If, as Red Lion holds (395 U S at 393), the Commission can properly require licensees "to give adequate and fair attention to public issues...", it follows, under U.S. v. Storer Bctg. Co., 351 U.S. 192 (1956) and FCC v. ABC, 347 U.S. 284, 289 n.7 (1954), that the Commission can prescribe by rule or policy what constitutes "adequate" attention to this category of public issues (free programming presentations by candidates in local races deemed important to the community but about which the public would otherwise not be informed by broadcast efforts). While the Commission would proceed by the guideline or "safe harbor", the licensee could always make a showing why it is operating in accord with the public interest in the particular circumstances.

[11] See Greater Boston Television Corp. v. FCC. 444 F 2d 841, 654 (D.C. Cir. 1970). cert. denied, 403 U.S.923 (1971) (" . a question would arise whether administrative discretion to deny renewal expectancies, which must arise under any standard, must be reasonably confined by ground rules and standards...").

actual programming decision, as is required by the statutory scheme in the broadcast field See CBS v. DNC, 412 U.S. 94 (1973).

Accordingly, we advance the following proposal that the period in which these broadcasts must be made available be confined to 30 days before the general election; that for television, the amount of time to be devoted be 20 minutes each day, 6 am to midnight, at least five minutes of which must be in prime time (with the other three five minute segments occurring in other day parts); and that in radio with its generally very short talk formats, the figure would be six minutes, in at least one minute segments, including one in "drive time."

We urge that the daily amount is not burdensome, is confined to a narrow window during the year, and can be accommodated without disrupting the program schedule In television, for example, the five minute segments could be inserted at the end of some half-hour program, with no undue disruption of the schedule. A number of programs were produced in past elections tailored to such insertion, and could be again so designed, if this approach were adopted.

While we propose this approach in order not to be burdensome or disruptive, we point out that it does accomplish a great deal As public service, it would be free and thus would be available to candidates in important races who are financially unable to purchase time; it would afford an opportunity for the candidates to present a much more in-depth discussion of the important issues than is possible in the short spot announcement; it could become a focal point

in the campaign -- a mini-debate between the candidates, sharpening their differences and informing and interesting the public; and finally, it is much more likely to be used, in contrast to the experience of offering programming time or debates to candidates who purchase campaign ads and wish to rely upon such ads, rather than accept an offer of time for a programming appearance or debate.[12]

We also point out that the proposal is simply a "safe harbor" floor - not a ceiling. Licensees would be free to adopt political programming plans that differ by going beyond this "floor." The variations are numerous and would of course be a matter left to the licensee's discretion.

The licensee would also have very great discretion as to the races to be afforded such time. The broadcaster would be required to focus on races that are significant and important to their communities -- yet have not been covered extensively or significantly in campaign ads or other political programming It follows that under the statutory scheme, the licensee must have great discretion, very largely unreviewable by the Commission, as to the races to be selected for this public service allotment of programming time. Further, while we would hope that the licensees in any given area would consult with one another, so that important or significant races are not omitted because of duplicative efforts, this again is a matter solely for the licensees' judgment.

[12] Thus, experience shows that offers like that of Belo Corp (Request of Belo Corp., Staff Ruling, DA 96-1653, Oct. 1, 1996) were very often not taken up by candidates committed to campaign ads.

There remains the question of the equal opportunities requirement of Section 315. Where there are no fringe party candidates (e.g., Socialist Labor; Vegetarian; Libertarian; etc.), this poses no problem. The licensee could present the major party candidates (and any serious third party candidate) in rotating order in these 5 minute segments (with each getting an opportunity in prime time). Where there are fringe party candidates as in the Pesidential race,[13]the licensee could make use of the King ruling, exempting under 315(a)(4) back-to-back presentations from the equal opportunities requirement In television, it could present, say, the two major party candidates back-to-back in 2 and 1/2 minute segments[14] or in segments on alternating days.[15]

This proposal would, we urge, markedly promote the "the larger and more effective use" of broadcasting in the public interest (Section 303(g)). It could be accomplished, after expedited rule making proceedings, either through adoption of a rule or a policy, embodying the above described processing guidelines [16]

The proposal would be applicable to the present broadcasting operation. We recognize that broadcasting is in transition to its digital future, but the exact nature of that future remains uncertain and will depend on the decisions made

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[13] See King Broadcasting Co. v. FCC, 860 F.2d 465, 467 (D.C. Cir. 1988).

[14] This would have the advantage of being even more of a confrontation on the issues, with the same audience hearing both sides, the disadvantage would be the reduced time for each of the candidates to explain their positions. Again, use of this arrangement, either to create more interest or because of the present of fringe party candidates, would be matter for the licensee's judgment.

[15] See Request of Fox Broadcasting Co., et al., Declaratory Ruling, FCC 96-155, Aug. 19, 1996.

[16] For legal reasons, we do not suggest that the proposal include cable television. See Section 624(f)(1), proscribing any new Federal or State agency content regulation not in existence at the time of the 1984 Cable Act. Compare Sec. 315(a)-(c) with Sec. 312(a)(7).

by broadcasters as to the use of their 19.4 Mbs, and regulatory determinations, such as to the pending multicasting"must carry" controversy. New public interest obligations may well be in order in that digital milieu and will thus be threshed out in a different proceeding.[17] At this time, the most salient fact is that the general election of 2004 is approaching, and that the public interest in an informed electorate calls for speedy promulgation of the proposal here advanced. It is that factor which also rules out relegating this proposal to the Localism in Broadcasting Initiative (FCC Release , Aug. 20, 2003) and compels the requested expedited treatment.

5 No Congressional enactment precludes adoption of this policy.

Finally, we deal here with the argument that this is an area which has been totally occupied by a comprehensive Congressional scheme, leaving no room for agency action along the above lines. This, we submit, is not the case. The starting point for analysis of this is "the language employed by Congress" (CBS, Inc. v. FCC, supra, 453 U.S. at 377). There is no statutory language precluding the proposed FCC action as to public service programming time for candidates in important local races, about which the public would otherwise be left uninformed by broadcasters. As shown by Section 624(f)((1) (see n.16), Congress knows how to make clear its intention to confine the agency role when it wants to do so.

Here on the contrary, Congress has stressed in the statute and legislative history its full agreement that affording time for political broadcasts is a

[17] See, e.g., In the Matter of Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360 (1999)

crucial part of the requirement to operate in the public interest. See discussion, 3-4. The Supreme Court has stressed the same value as vital to the First Amendment -- as the very "essence of self-government." CBS, Inc. v. FCC, 453 U.S. at 396. The Commission here would be fleshing out a part of that crucial public interest responsibility in light of a significant deficiency. As shown (n.10), the agency has ample authority to do so.

The preclusion argument may stem from confusion between what Congress has done or may do in the area of campaign finance reform and what the public interest obligation can entail in this area. While the reform process is still under consideration, Congress has delineated a scheme, lowest unit rate, for promoting candidate access to paid time as a facet of campaign finance reform. The Commission can adopt and has adopted rules to carry out that scheme. In doing so, the Commission must act consistently with the statutory requirements, it could not, for example, change the rate approach or time period specified

But this campaign finance reform legislation is directed " ..to a right of reasonable access for the use of stations for paid political broadcasts on behalf of ..Federal candidacies... " (CBS, Inc. v. FCC, 453 U.S. at 382). It does not deal at all with the issue of public service time for political programming appearances in order to fulfill a public trustee need in the local community. We stress that this modest public service time proposal has nothing at to do with campaign finance reform, a matter beyond the FCC's purview, and

indeed, if promulgated, would not in any way obviate the need for such reform in the view of its proponents.

Finally, there is the argument based on the language of 312(a)(7), that revocation is limited to "willful or repeated failure to allow reasonable access to or purchase of reasonable amounts of time ... by a candidate for Federal elective office ..."; state or local candidates thus have no specific right to access to broadcast facilities; and therefore, it is asserted, broadcasters have no public interest obligation to inform their communities about non-federal local candidacies.

But this last statement is a blatant misreading of the Congressional statute and purpose. Congress had adopted "lowest unit rate" for all election appearances by candidates, and was concerned that broadcasters would then avoid selling time for the Presidency or Congressional races (Senate and House) -- hence 312(a)(7) It did not extend that right of access to all candidacies, because that would make the broadcaster a common carrier as to political broadcast appearances, and would thus contradict the contrary provision in 315(a) (see n 7). The Federal races are all of great importance. In addition to the House races,[18] non-Federal local races can certainly also be of considerable importance to the community (e.g., mayor, governor; county commissioner), but there are thousands of such races and many could be of little or no interest. This explains and justifies the different treatment of Federal and other local races.

[18] The great majority of House races would fall within this proposal, because candidates for House usually do not buy the expensive time for TV campaign ads. See n.9.

However, Congress clearly was not saying that broadcasters could ignore their public interest obligations as to all local non-Federal elections. Indeed, the legislative history is crystal clear that Congress wanted full compliance with the existing public interest obligation, and "certainly, no diminution in the extent of such programming should result from enactment of this obligation" (emphasis added; see p.4).

Just suppose that a broadcaster announced a policy that it would not afford any time for access or ads by any local candidate -- that it would afford access only to Federal candidacies. Such a policy would be arbitrary and in clear conflict with the public interest obligation to inform the electorate in its community. Unlike in the Federal area, the broadcaster has great discretion as to local races and need not accede to any individual request from a non-Federal candidate [19] But a broadcaster cannot assert that whatever the importance to the community, it will never contribute to informing the public in any local non-Federal race.[20] As stated, there is no indication in the legislative history that Congress sought such an arbitrary and ludicrous policy, considering the importance of many state and local races to democratic governance, and every indication to the contrary. See 3-4 Indeed, such a policy would violate due process and equal protection, and would be unconstitutional

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[19] See Codification of the Commission's Political Programming Policies, FCC 91-403, pars.11-12 ("As the Court explained in CBS, Inc. v. FCC, [453 U.S. 367, 378-79, n.6 (1981)], under the 'public interest' standard, 'an individual [non-federal] can claim no right of personal access.' "

[20] Of course, the broadcaster could inform the public through its journalistic efforts, but as shown by the Lear study, that is not the case, and the remedy is not for the FCC to try to tinker with these journalistic efforts, especially the newscast. See pp.6-8. The broadcaster could also claim that in its judgment this year, there is no

The 1991 FCC decision (n.19) focussed on a specific right of individual access, and soundly found it confined to Federal candidates, but did not consider the general or overall public interest facet here discussed. We therefore strongly urge the Commission to take this opportunity to clarify that the pattern of operation shown by the Lear study is not consistent with the public interest obligation of a broadcasting system established and allocated so much spectrum specifically to serve as local outlets for their communities.

CONCLUSION

For the above reasons, we urge the Commission promptly to issue a Notice of Proposed Rulemaking, so that a proposal along the foregoing lines can be the subject of expedited comment and definitive action before the upcoming general election period.

Respectfully submitted,

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important or significant local race about which the public would be left uninformed; that would be an extraordinary claim, but the broadcaster is entitled to make such a claim and showing.